

1 evidence.)

2 So 26 is rejected. It's
3 identified for the record, but your motion to
4 offer it into evidence is denied and it's
5 rejected but it stays with the record.

6 MS. WALLMAN: I checked the ruling
7 naturally, Your Honor, but this was an attempt
8 to economize on what went into the record. I
9 appreciate the effort, but it's not the time
10 to -- it's not the same thing. It's apples
11 and oranges. You're talking about taking
12 snippets of the document that you say that the
13 other side -- He's saying that the other side
14 issued to the public or something. The other
15 one was just his short-hand observation of
16 what's going on and that's different.

17 Twenty-six is out, but it stays
18 with the record. What's the next one?

19 MR. COHEN: Twenty-seven, Your
20 Honor, maybe falls into the reserved category.
21 This is some effort by Mr. Herring I assume to
22 read some other documents in the record and

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1 make some point. There's going to be
2 testimony about Mojo's target audience. He
3 obviously doesn't have any first-hand
4 knowledge. He's -- I'm sorry, Your Honor.

5 JUDGE SIPPEL: I'm sorry. You
6 finish. Finish talking.

7 MR. COHEN: I was going to say,
8 Your Honor, that he's obviously not a
9 competent witness for this. He's read a Mojo
10 document and presented a table. So he's not
11 competent to testify. It's hearsay. He
12 doesn't have any personal knowledge of these
13 numbers. I mean if they want to try to put in
14 the Mojo document on cross examination or
15 through some other way they can.

16 JUDGE SIPPEL: Let me hear from --
17 Who wants to take this one? Mr. Feld.

18 MR. FELD: Thank you, Your Honor.
19 It was as Mr. Schonberg, I'm sorry.

20 MR. SCHONMAN: Schonman.

21 MR. FELD: Schonman said earlier.
22 This is offered on what is the basis of his

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1 testimony. It summarizes the testimony. It
2 cites to the public document which he got this
3 from and saying again it goes to giving the
4 time frame. It goes to when they were
5 formulating the case. It goes to how do I
6 know that these guys were same, were going
7 after the same demographic that I did. Well,
8 there was an advertising supplement in which
9 they put an ad in that said I'm going after
10 this demographic and that's why I said they're
11 going after my audience. It seems that it's
12 no different from any of the other evidence
13 that again is the basis of his decision as the
14 president of the company saying that these
15 guys are going after the same guys that I'm
16 going after.

17 JUDGE SIPPEL: You know this is
18 type of information that it could be agreed,
19 if it could be stipulated, that it was that
20 clear on its face that it would be stipulated.
21 But I take it, Mr. Cohen, you're not prepared
22 to do that.

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1 MR. COHEN: I don't think we're
2 going to have a huge debate over Mojo's target
3 audience. My concern is that I don't know if
4 this is accurate. Here's my problem. They're
5 documents in Mojo's -- That we've produced in
6 discovery. We're not going to hear anything
7 that Mojo said is great and we can adopt it.

8 We produced the document. He
9 thinks it's a good document. He sticks it
10 into a table. That's not the way evidence
11 should work. But we'll try to stipulate to
12 the Mojo demographic. I don't know whether it
13 could be possible or not. Mr. Asch is going
14 to testify about it. The experts are going to
15 testify about it.

16 MR. MILLS: There will be
17 testimony about Mojo's demographic and there
18 will be opportunity to cross examine. The
19 problem with this document is all the reasons,
20 Your Honor, said that a press release might
21 have some addition of reliability. This
22 doesn't have that. This is coming out of some

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1 unidentified advertising supplement to
2 Television Week and it is highly selected.

3 It's just the fact or snippet that
4 WealthTV decided to put in here. There is no
5 indication of reliability of this or context
6 and that's different than a press release.

7 JUDGE SIPPEL: All right. I've
8 heard enough.

9 MS. WALLMAN: Your Honor, just
10 before you rule.

11 JUDGE SIPPEL: Ms. Wallman.

12 MS. WALLMAN: This is maybe a best
13 evidence issue here, but this comes with
14 something that put out by Mojo.

15 MR. FELD: They paid money to put
16 it in the magazine.

17 MR. MILLS: That sounds like
18 testimony. It doesn't make it inadmissible.

19 JUDGE SIPPEL: Why not put the
20 magazine in, offer the magazine? I mean not
21 the whole magazine but the page from the
22 magazine.

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1 MR. MILLS: Cross examine the
2 witness --

3 JUDGE SIPPEL: Well, I don't even
4 know if he read it right. I mean I don't mean
5 to undercut Mr. Herring, but I'm saying I have
6 no basis for relying on these numbers, the
7 accuracy of the numbers. Numbers again
8 they're depend than genreing if I can say
9 that. This is very specific stuff and it's
10 either right or wrong and I have no way of
11 finding out unless you want me to go back and
12 dig this up. I'm not going to do that to
13 Television Week or whatever it.

14 I'm sorry. I don't want to sound
15 that I'm trying to be disrespect to the
16 material. I would certainly assume that it
17 was done carefully and it's probably right.
18 The problem is that it doesn't have the degree
19 of reliability that I need to bring it in as
20 a hearsay document. So I'm going to reject
21 unless you can use it as the basis for getting
22 an agreement, a stipulation.

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1 I'm going to reject 27. I mean
2 this is not reserved. This is rejected under
3 the hearsay rule.

4 (Whereupon, the above-referred to
5 document was marked for
6 identification as WealthTV Exhibit
7 No. 27, and rejected from
8 evidence.)

9 MS. WALLMAN: Your Honor, I assume
10 that ruling, Your Honor, is not preclusive of
11 our using information like this or perhaps the
12 underlying advertising supplement on cross
13 examination.

14 JUDGE SIPPEL: On cross
15 examination, you're welcome to use, yes,
16 anything like that. But bringing it in as a
17 direct exhibit at this stage of the case, I
18 would be look very askance at that just on
19 timeliness. But as a cross examine document,
20 absolutely, anything is open game. I mean I
21 would rule on it at that point if there's an
22 objection. But it is. It's still in the ball

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1 park of cross examination.

2 Twenty-seven is identified and
3 rejected as a WealthTV exhibit. Twenty-eight.

4 MR. COHEN: Twenty-eight, Your
5 Honor, it's hearsay and this is another good
6 example of Mr. Herring as an expert because
7 while it's not apparent from the face of this
8 document Table 6, the third column, in Exhibit
9 28.

10 JUDGE SIPPEL: Yes.

11 MR. COHEN: That's Mr. Egan's
12 table. That's from our expert's table about
13 demographics. So here he has collected
14 information from our expert, two pieces. I'm
15 not quite sure what the Mojo Viewer is or Mojo
16 TV Week. I assume it's the document that we
17 were talking about before and this is hearsay.
18 It's not reliable and it's clearly expert
19 material on its face since Table 6 comes from
20 Mr. Egan's expert report as I understand it
21 which is why it has redactions because Mr.
22 Herring can see confidential, but not highly

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1 confidential information as I understand it
2 under the protective order.

3 JUDGE SIPPEL: Well, who wants to
4 take that one? There's a lot of silence.

5 MR. ROSE: It's another summary of
6 an exhibit. It is their exhibit. I suppose
7 it's similar to 26 in that regard and he's
8 basically taking evidence that they've got on
9 some of their exhibits and summarizing it.

10 JUDGE SIPPEL: Again I can't even
11 tell from this exhibit where it's being taken
12 from. It's just out of air. I mean Mr. Cohen
13 realized Table 6. But I would never have a
14 clue what that is from. I'm going to reject
15 it on the same basis as 27.

16 (Whereupon, the above-referred to
17 document was marked for
18 identification as WealthTV Exhibit
19 No. 28, and rejected from
20 evidence.)

21 It's marked, identified, but it's
22 rejected for hearsay and for no indication of

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1 reliability. Twenty-nine.

2 MR. COHEN: Twenty-nine, Your
3 Honor, we have problems with 29. Twenty-nine
4 which are two emails from Mr. Carstenson, one
5 is to Mr. Herring and one is to Mr. Turner.
6 Mr. Carstenson worked for Mr. Turner. Mr.
7 Turner who is going to testify as an expert
8 for Wealth was hired in 2008 for a period of
9 time of six months to be an advertising rep
10 for WealthTV.

11 Mr. Carstenson is not going to
12 testify. It's not a business record of
13 WealthTV. I can't cross examine Mr.
14 Carstenson because he's not here. Mr. Turner
15 has already testified at his deposition that
16 he didn't go to any meetings. So he's not
17 going to help us.

18 And then attached to that is a
19 presentation of Wealth's dated October 2007.
20 I don't know what's being represented. If
21 it's being represented that this presentation
22 was made by Mr. Carstenson that's an

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1 internally inconsistent representation because
2 Mr. Carstenson and Mr. Turner did not begin
3 working from the testimony that we have for
4 Wealth until 2008.

5 So I don't have an objection to a
6 Wealth 2007 presentation. I don't know what's
7 intended by attaching it to this hearsay email
8 because there's nothing on the face of this
9 email that says that this presentation is an
10 attachment. So I just don't know why it's
11 here. But if Wealth wanted to separately this
12 GM presentation then Mr. Herring certainly can
13 sponsor it and they can testify to it.

14 JUDGE SIPPEL: Okay. I need a
15 response from WealthTV.

16 MR. ROSE: I believe the point of
17 putting these in is that he was representing
18 this to the people he was hiring to represent
19 what his ad was. It's the kind of
20 presentation he wanted made about his company.
21 This is the kind of position they were taking
22 in the market and what genre they are so to

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1 speak, what audience they're appealing to.

2 There's a dispute here as to
3 whether they're seeking similar audiences as
4 Mojo and this is a record from his other
5 business of the kind of audience he was
6 seeking, what he was telling his admin to go
7 out and look for.

8 JUDGE SIPPEL: So you're saying
9 it's business record. It's a WealthTV
10 business record, both of these documents.
11 There are two documents in the exhibit by the
12 way. At least my copy is.

13 MR. COHEN: Your Honor, I don't
14 see any reference in the email to the attached
15 just to be clear.

16 JUDGE SIPPEL: Well, let me get
17 them started. I've got my question out there.

18 MR. ROSE: I believe Mr. Herring
19 will testify that these are records that there
20 was in fact attached. Mr. Cohen is correct.
21 There's not a reference saying it was
22 attached, but that will come into the

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1 testimony as I understand.

2 JUDGE SIPPEL: Is it a fact that
3 these are both records, WealthTV records?

4 MR. ROSE: Certainly, they were
5 generated in the course of business. He was
6 telling his admin what to say and he was
7 sending him a presentation to say.

8 JUDGE SIPPEL: Okay. Let's see.
9 It's from Mr. Herring.

10 MR. COHEN: No, that's my problem,
11 Your Honor. It's from Mr. Carstenson.\

12 JUDGE SIPPEL: I'm sorry. I'm
13 reading it from a different place. Which one
14 are you starting with because there are one,
15 two --

16 MR. ROSE: There are two emails.
17 I was confused.

18 JUDGE SIPPEL: There are two
19 emails and the pages are one, two and three.
20 So which page do we start with?

21 MR. COHEN: Is there a page one
22 that we're missing? That's an email from Mr.

1 Herring. I don't have an email from Mr.
2 Herring in this exhibit.

3 JUDGE SIPPEL: Well --

4 MR. ROSE: It does look like his
5 name appears at the top of this but I can't --

6 JUDGE SIPPEL: His name does
7 appear at the top as though it were. The
8 attachments are it says for itself what it is,
9 "Wealth on Wheels Interactive PPT." And it
10 says more than that.

11 MS. WALLMAN: Your Honor, I'm
12 advised that there is a page missing from this
13 exhibit to which I apologize.

14 JUDGE SIPPEL: Well, let's get --

15 MR. COHEN: I think I now see it.
16 I don't know if the Court has it.

17 JUDGE SIPPEL: What is it? What
18 page would it be? I've got three pages.

19 MR. COHEN: Three pages of emails?

20 JUDGE SIPPEL: Yes.

21 MR. COHEN: I only have two pages.
22 The first page that Mr. Harding just gave me

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1 the bottom part of the page is an email from
2 Mr. Herring to Larry, IDriveSales. So that
3 must be Mr. Carstenson.

4 So we would not object to the
5 piece of this email chain if Mr. Herring is
6 just sending an email. That's perfectly
7 appropriate. The emails, the two emails, that
8 appear to follow, both of which are from Mr.
9 Carstenson, are hearsay and that hearsay is
10 not overcome by the business record exception
11 because they're not his documents. They're
12 documents created by IdriveSales.

13 I don't think -- And then the
14 email says he attaches two PowerPoints and
15 there's only one PowerPoint attached. So
16 there's a completeness problem as well.

17 MR. MILLS: And that's the email
18 that came three months later that was said it
19 looks like -- The attachment didn't appear
20 until March 27, 2009 at the very top of the
21 first page. That's where the attachments
22 first appeared and that's just to Tim

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1 Robertson and doesn't appear to be related to
2 Charles Herring's email at the bottom of page
3 one.

4 MR. COHEN: This looks like a
5 document, you just can't tell on its face,
6 that it's internally inconsistent document in
7 addition to the hearsay.

8 MS. WALLMAN: Your Honor, we tried
9 to present complete exhibits and I apologize
10 that the first page appears to be missing from
11 some versions. Tim Robertson is an IT type
12 person in the company. His name may appear at
13 the top of that page because he helped produce
14 the document. There are in fact two
15 PowerPoint decks. The second PowerPoint deck
16 begins at 11.

17 MR. COHEN: Eleven. Oh, over
18 here. I apologize. I do have two. I
19 apologize. I didn't see that.

20 MS. WALLMAN: That's okay. Twelve
21 in the numbers.

22 JUDGE SIPPEL: Eleven. I'm sorry.

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1 MS. WALLMAN: It may be 12 in your
2 version, Your Honor.

3 JUDGE SIPPEL: Are you talking
4 about tabs?

5 MS. WALLMAN: No, Your Honor. I'm
6 talking about the internal numeration of
7 Exhibit 29. If you turn to page 12 of the
8 exhibit, you'll see a second introductory
9 slide, WealthTV.

10 JUDGE SIPPEL: I'm sorry. I see.

11 MS. WALLMAN: I'm trying to
12 respond to some of the things that Mr. Cohen.
13 There are in fact two attachments, two
14 PowerPoints, to this.

15 MR. COHEN: I acknowledge that.

16 MR. MILLS: In mine, it's page 13.
17 That's the beginning of the sentence.

18 MS. WALLMAN: Yes.

19 MR. MILLS: Page 13.

20 MS. WALLMAN: Yes, and we're
21 trying to present a complete picture here of
22 what the exchange was between the company and

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1 the -- They were asking them to represent
2 them to advertisers. We're not relying on the
3 truth of anything represented here in Mr.
4 Carstenson's statement.

5 JUDGE SIPPEL: It's Carstenson?

6 MS. WALLMAN: Carstenson is the
7 name of the man.

8 JUDGE SIPPEL: Carstenson. Make
9 sure the reporter has that. That's a tricky
10 name. Carstenson.

11 MS. WALLMAN: Yes.

12 JUDGE SIPPEL: Actually that's
13 Norwegian. Anyway.

14 MS. WALLMAN: Your Honor, you'll
15 see as the testimony develops in this trial
16 there are issues about what the advertising
17 people were told to say about WealthTV and
18 this is an important exhibit to us because it,
19 with the proper first page on top, indicates
20 what the company was telling Wealth and
21 telling people to say about WealthTV in
22 pitching advertising sales.

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1 JUDGE SIPPEL: All right. It's an
2 internal document then from WealthTV.

3 MS. WALLMAN: Correct.

4 JUDGE SIPPEL: And it is complete
5 because you have -- I would miss the fact that
6 it's got the photocopies of the slides and all
7 that PowerPoint material. Go ahead, Mr.
8 Cohen.

9 MR. COHEN: Your Honor, I think I
10 see Mr. Mills' point now that I see the whole
11 document. Do you have on the top of your
12 Charles Herring to Tim Robertson dated March
13 27, 2009? Is that the first page of the
14 exhibit that you have?

15 JUDGE SIPPEL: The first page that
16 I have -- At the very top of the first page?

17 MR. COHEN: Yes, the very top of
18 the first page.

19 JUDGE SIPPEL: It says, "From
20 Charles Herring to Tim Robertson."

21 MR. COHEN: Right, and I think
22 that the problem that we're having is that has

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1 an attachment of these two PowerPoints.
2 That's in March. The correspondence -- March
3 of '09. The correspondence between Mr.
4 Herring and Mr. Carstenson is in the first
5 quarter of '08.

6 JUDGE SIPPEL: Yes, I see that.

7 MR. MILLS: There are no
8 attachments referenced.

9 JUDGE SIPPEL: I see that. It
10 looks like it was cut and pasted.

11 MR. COHEN: Well, it says, "I have
12 attached two PowerPoint presentations," but
13 there's nothing in this document that tells
14 that those are the two that were attached.

15 JUDGE SIPPEL: I see what you're
16 saying. It looks like it was cut and pasted
17 or something.

18 MS. WALLMAN: Your Honor, Mr.
19 Herring will testify that these attachments
20 were attachments to his email.

21 JUDGE SIPPEL: Which email are you
22 talking about?

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1 MS. WALLMAN: I'm talking about
2 his outbound email.

3 JUDGE SIPPEL: All right. His
4 outbound email. Is that the one that's dated
5 March 27 to Mr. Robertson?

6 MS. WALLMAN: I'm disadvantaged.
7 May I look at that please?

8 JUDGE SIPPEL: Or the one that's
9 dated 2008 from Charles Herring to Larry
10 IdriveSales.net?

11 MS. WALLMAN: Yes, the January 25,
12 2008 and the material above that is an
13 artifact of the way in which the document was
14 obtained from the company files and produced.

15 MR. MILLS: Your Honor, the
16 question I have about that, I understand how
17 it came out through the IT Department and how
18 it was printed. But usually you see either a
19 line that says attachments or sometimes you
20 see an icon that shows an attachment was
21 there. I see the line that says attachments
22 from March '09, but I don't see -- And I know

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1 there's a reference to attachments. But I
2 don't see anything that says attachments in
3 the 2008 email chain and no icons.

4 So while I understand that
5 somebody at some later point felt that these
6 were the two attachments that must have been
7 or they thought were attached to those earlier
8 emails. We don't know that.

9 MR. ROSE: But Mr. Herring is
10 going to testify about the nature of his email
11 and to show that he's telling me it was
12 attached. I'm --

13 MR. FELD: This is not a case of
14 hearsay because the witness is here and will
15 verify the document.

16 JUDGE SIPPEL: Well, all right.
17 Aside from this problem with the chain of
18 custody almost kind of evidence here the
19 substantive story that it tells with respect
20 to the PowerPoint slides and all that, is
21 there any objection to that in terms of
22 relevance?

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1 MR. COHEN: The PowerPoints
2 themselves, no, Your Honor.

3 JUDGE SIPPEL: All right. Well,
4 let's try and straighten this thing out. I'll
5 allow it to come in subject to Mr. Herring
6 satisfying me that this chain of emails are
7 what they purport to be, that you say they
8 purport to be.

9 (Whereupon, the above-referred to
10 document was marked for
11 identification as WealthTV Exhibit
12 No. 29, and received in evidence.)

13 And there will be an opportunity
14 to voir dire him or however you want to get at
15 it, Mr. Cohen.

16 MR. COHEN: Thank you, Your Honor.

17 JUDGE SIPPEL: Because I would
18 like to get on with the show here. So 29 is
19 basically received. It's identified and
20 received. Your motion is granted to, Mr.
21 Rose, receive it into evidence today subject
22 to voir dire/cross examination to validate the

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1 chain of, I'm going to call it, the chain of
2 custody, but I'm sure there's a better word
3 than that. So that's my ruling. Let's move
4 onto 30. Maybe if we can finish 33 we can go
5 to lunch.

6 MR. COHEN: Thirty, Your Honor, is
7 a problematic document.

8 JUDGE SIPPEL: Oh boy.

9 MR. COHEN: Sorry to say that.
10 Let me put it in context.

11 JUDGE SIPPEL: All right.

12 MR. COHEN: There is expert
13 testimony that, Your Honor, Wealth is going to
14 purport to or try to put in from a gentleman
15 named Mr. Kersey. Mr. Kersey is --

16 JUDGE SIPPEL: How do you spell
17 his name?

18 MR. COHEN: K-E-R-S-E-Y. Mr.
19 Kersey has put a declaration in. It goes back
20 to 2008 about a tabulation from their website
21 of men and women who responded to their
22 website. So they got certain responses to

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1 their website and they tabulated men, women
2 and age and Mr. Kersey gave us all the backup
3 for that. He looked at a couple of hundred
4 tabulations. He gave us the underlying forms.
5 We think there are lots of problems, but we'll
6 cross examine him about that.

7 This document was mentioned in Mr.
8 Kersey's deposition. It had never been
9 produced by WealthTV. It showed up in the
10 afternoon at the deposition and this purports
11 to be a tabulation that somebody named Mr.
12 Nickels did who is internal. If you turn to
13 the second page, it has information about men
14 and women.

15 JUDGE SIPPEL: Wait a minute.
16 Don't get too fast for me here. I'm on 30.

17 MR. COHEN: Thirty, the back page.
18 It's in color.

19 JUDGE SIPPEL: I got the email and
20 then I got the thing in color.

21 MR. COHEN: Correct.

22 JUDGE SIPPEL: The data.

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